No. SC92175

IN THE

Supreme Court of Missouri

STATE OF MISSOURI,

Respondent,

v.

EMILY BOLDEN,

Appellant.

Appeal from the St. Louis City Circuit Court
Twenty-second Judicial Circuit
The Honorable John J. Riley, Judge

RESPONDENT'S SUBSTITUTE BRIEF

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STATEMENT OF FACTS

Ms. Bolden appeals from her convictions of assault in the first degree, § 565.050, RSMo 2000, and armed criminal action, § 571.015, RSMo 2000 (L.F. 91). Ms. Bolden asserts two claims on appeal: first, that the trial court plainly erred in submitting Instruction No. 14 (instructing on the issue of use of force in defense of third persons); and second, that the trial court abused its discretion when it did not hold an additional hearing after Ms. Bolden alleged that a juror who served in the case was not qualified and had engaged in "misconduct" (App.Sub.Br. 12, 14).

* * *

In April, 2007, Randy Bolden was living with Katina Harris, the mother of his children (Tr. 496, 501, 605). On April 21, Randy and Katina were hosting a barbecue at their home, and Katina's friend, Danielle Powell, stopped by that morning and periodically throughout the day (Tr. 503-504). Katina's family was present, as was Ms. Bolden and her children (Tr. 504). Everyone was drinking beer (Tr. 504). At some point, Danielle's mother, Fannie, stopped by to visit, and while she was there, she witnessed Randy discipline his son in a manner she disagreed with (Tr. 505). Fannie told Katina that if she wanted her son to go over to Fannie's house, she would keep an eye on him (Tr. 505-506). Katina's son went to Fannie's house to play with her granddaughter (Tr. 512).

Eventually, Katina believed that Randy had had too much to drink, and the two of them started arguing (Tr. 506). Randy spit on Katina, and she told him to leave (Tr. 506-507). Ms. Bolden also became involved in the argument, taking Randy's side, so Katina asked her to leave as well (Tr. 507). Ms. Bolden kicked Katina and the two continued to argue (Tr. 507-508). Katina told Ms. Bolden she was going to call the police, and Katina took Ms. Bolden's car keys and ran down the street towards Fannie's house with Ms. Bolden behind her (Tr. 508). Ms. Bolden eventually caught up with Katina, and Katina later reported to police that Ms. Bolden struck her in the head with a cement brick (Tr. 508, 618). Danielle intervened, and Ms. Bolden and Randy left in Ms. Bolden's car (Tr. 509).

Katina went to Fannie's house a second time wanting to call the police, reporting that a window had been broken on the back side of her house; she also reported being struck in the head again by Ms. Bolden (Tr. 402). After the window was broken, Katina told Danielle that she was scared to go back home, so Danielle suggested Katina go spend the night with some other family (Tr. 511). Katina agreed, and she and Danielle left with Katina's younger son, leaving her older son with Fannie. (Tr. 512).

Around 8:30 or 9:00 p.m., Tiffany Powell was sitting on her front porch when she saw Randy and Ms. Bolden pull up to Katina's house (Tr. 405). She had not met them before (Tr. 409). Ms. Bolden and Randy got out of the car, and

Randy went to the house, kicked in the front door, and then went back to the car (Tr. 405, 453). Randy and Ms. Bolden backed the car down the street towards Fannie's house, stopping at the house just before (Tr. 406). Tiffany stood up as Randy and Ms. Bolden approached, yelling and asking where Katina was and demanding that she come outside (Tr. 406-407). Randy and Ms. Bolden continued to yell for Katina to come out, using a lot of foul language (Tr. 407). Randy said, "Where that bitch Tina at, tell her that she need to come out the house because I got my sister to beat her ass" (Tr. 541). Tiffany believed that Randy and Ms. Bolden had been drinking based upon their demeanor and the smell of alcohol (Tr. 408).

Tiffany advised them that Katina was not there and that they needed to leave; she was a little upset because there were children in the house (Tr. 408). At some point, Randy's son came down the steps and opened the door (Tr. 409). Tiffany told the boy to close the door and go back upstairs (Tr. 409). Randy saw him and demanded that he come outside (Tr. 409). Tiffany told Randy that the child was there because Katina had brought him over (Tr. 409). Randy and Ms. Bolden then lunged at Tiffany, yelling that they knew Katina and Danielle were inside and she and her son needed to come out (Tr. 409-410). Fannie then came outside and advised Randy and Ms. Bolden that neither Katina nor Danielle were there and that Randy and Ms. Bolden needed to leave (Tr. 410).

At some point, Randy, holding a screwdriver himself, handed Ms. Bolden a butcher knife; a physical altercation ensued, and Ms. Bolden stabbed Tiffany in the hand (Tr. 411-413, 545, 550-551, 569). Fannie became upset that her daughter had been stabbed and told Ms. Bolden, "I know you just didn't cut my baby" (Tr. 307). Fannie and Ms. Bolden then began fighting, and Ms. Bolden still had the knife in her hand (Tr. 307-308). After being stabbed, Tiffany staggered back towards the stairs (Tr. 413). As she leaned up, Randy grabbed her and threw her to the ground, lying on top of her to keep her on the sidewalk so that she could not get up and help her mother fend off Ms. Bolden, who had begun stabbing Fannie repeatedly (Tr. 309-310, 380, 413-414, 416, 543).

Tiffany eventually freed herself and ran over to where Ms. Bolden was stabbing Fannie, who was lying on the ground; Tiffany told her mother to get up because Ms. Bolden was still stabbing her (Tr. 310, 417-418). Randy then came over and pulled Ms. Bolden off of Fannie, saying, "it's time to go" (Tr. 310, 420). As they were leaving, Randy threatened, saying, "tell them [meaning Danielle and Katina] this is the message, we're leaving a message for them" (Tr. 382, 388, 421). Randy and Ms. Bolden got in the car and drove away (Tr. 310, 420). Emergency services were called, and while awaiting the police and ambulance, Fannie called Danielle (Tr. 312, 512). Fannie was frantic and screaming, so Danielle and Katina turned around to head back to Fannie's house (Tr. 513).

When they arrived, Danielle saw blood everywhere. (Tr. 513).

As a result of Ms. Bolden's actions, Fannie suffered eleven stab wounds, received twenty-five stitches in her head, eleven stitches in her shoulder, and fourteen on her hand and arm (Tr. 314-315). Fannie also suffered permanent nerve damage in her shoulder where Ms. Bolden's last stab landed (Tr. 310, 313).

Around 11:24 p.m., Randy arrived at St. Louis University Hospital after being transferred from Cardinal Glennon (State's Ex. 17). Randy was intoxicated with a blood alcohol content of .324, and he told the hospital staff that he had just been in a fight in the park (State's Ex. 17). Randy had a deep laceration over his right eye, retinopathy of the right eye, and fractures to his right maxillary sinus and medial wall (State's Ex. 17). Randy cursed at staff, was uncooperative and combative, and had to be restrained and sedated for treatment (State's Ex. 17).[1]

The hospital staff contacted the police due to the nature of Randy's wounds (Tr. 566). The investigating officer spoke with Ms. Bolden, and upon realizing that she was the same person identified as a suspect in an earlier assault

[1] It is unclear how Randy received his injuries. Randy and Ms. Bolden testified that Tiffany attacked Randy with a screwdriver, but other witnesses stated that they never saw Tiffany with any weapons, and that Randy and Ms. Bolden initiated the altercation (Tr. 308, 417, 544-545, 755-756, 818-819).

case, he arrested Ms. Bolden and took her to the station (Tr. 567-568). He also conducted a search of Ms. Bolden's car because he intended to impound it (Tr. 568). During the search, the officer found a butcher knife in between the driver's seat and the center console, shoved with the blade end down so that it was not visible (Tr. 569). Subsequent laboratory testing on the knife confirmed the presence of Tiffany and Fannie Powell's blood on both the blade and handle of the knife (Tr. 591-593).

The state charged Ms. Bolden jointly with her brother, Randy, with two counts of first-degree assault, and two counts of armed criminal action (L.F. 15-17). The state also charged Ms. Bolden with second-degree assault and a third count of armed criminal action (L.F. 15-17). On February 1, 2010, Ms. Bolden's trial commenced (L.F. 7; Tr. 9).

The jury was instructed on defense of others and accomplice liability (L.F. 35-48). During the instruction conference, a question arose regarding the defense of others instructions due to the fact that a new model instruction had recently been released (Tr. 868). Ms. Bolden requested the defense of others instructions and advised the court:

> For the record, I had an instruction of defense of others, and counsel for the state and I collaborated over what we thought would be the best version given the change in the law and our disagreements over

> the language and settled upon the instruction that was submitted – ultimately submitted by the state.

(Tr. 869). Ms. Bolden lodged no objection to either of the defense of others instructions (Tr. 868-870).

When the trial court was reading the instructions to the jury, the court noted two errors in Instruction 14: first, that paragraph Second in the case-specific portion of the instruction referred to Tiffany Powell, rather than Fannie Powell; and second, that the second-to-last paragraph improperly referred back to Count I instead of Count III (Tr. 881). The court amended the instruction to refer to Fannie Powell, rather than Tiffany Powell, and the court advised the jury that the reference to Count I should have said Count III, as Instruction 13 discussed the defense of others in reference to Count I (Tr. 881; L.F. 35-40).

The jury acquitted Randy and Ms. Bolden of first-degree assault and armed criminal action with respect to Tiffany, but convicted them of first-degree assault and armed criminal action with respect to Fannie (L.F. 54-61). The jury acquitted Ms. Bolden of the charges involving Katina (L.F. 6). The trial court polled the jury, and the jurors all indicated that the verdicts announced were their verdicts. (Tr. 934).

Before sentencing, juror Shawn Richardson contacted the court, indicating a problem with the verdicts (Tr. 935). The court referred Mr. Richardson to the

attorneys for Ms. Bolden and the State (Tr. 935). In speaking with Ms. Bolden's counsel, Mr. Richardson reportedly indicated that he just "went along" with the proceedings, that the verdicts were not his, and that he should have so indicated when the jury was polled (Tr. 935-936). Mr. Richardson also reportedly indicated that he thought he was not competent to be a juror and that other people would have done a better job (Tr. 936).

When speaking with the prosecutor, Mr. Richardson reportedly indicated that his feelings of incompetence were based upon the fact that he had never served on a jury before (Tr. 938). Mr. Richardson also advised the prosecutor that he worked with the jury, reviewing the instructions personally, and that he paid attention to all of the facts and evidence in order to render his verdict (Tr. 938). When asked if he had changed his mind about the verdict he rendered, Mr. Richardson told the prosecutor that he had not (Tr. 938).

On the basis of Mr. Richardson's comments to Ms. Bolden's counsel, counsel filed a motion to compel testimony from Mr. Richardson at the motion for new trial hearing (Supp.L.F. 1-2). The trial court denied Ms. Bolden's motion (Tr. 939). The trial court then sentenced Ms. Bolden to ten years for assault and a concurrent term of three years for armed criminal action (L.F. 92).

Ms. Bolden appealed, and the Court of Appeals affirmed Ms. Bolden's convictions and sentences. This Court granted transfer.

ARGUMENT

I.

The trial court did not plainly err in submitting Instruction No. 14.

In her first point, Ms. Bolden asserts that the trial court plainly erred in submitting Instruction No. 14, one of two instructions that instructed the jury on the issue of defense of third parties. In her point relied on, Ms. Bolden identifies four arguments against the submitted instruction: first, that it was incorrectly patterned after MAI-CR 3d 306.08A instead of MAI-CR 3d 306.06; second, that it omitted explanatory language about imminent danger from those acting with the victim; third, that it incorrectly used a masculine pronoun at one point when it should have used a feminine pronoun; and fourth, that it incorrectly instructed the jury to consider imminent use of unlawful force by only Fannie Powell rather than unlawful force by Fannie Powell and "those whom [Ms. Bolden] reasonably believed were acting together with Fannie Powell" (App.Sub.Br. 15). (The second and fourth arguments are addressed together in Ms. Bolden's argument under the heading "Multiple Assailants" (App.Sub.Br. 23-25).)

A. Preservation and plain-error standard

Ms. Bolden acknowledges that she did not object to Instruction No. 14 as drafted (App.Sub.Br. 15). She also did not raise a related claim of error in her motion for new trial (L.F. 72-73). But this is not a case where the defendant

merely failed to object or failed to include a claim in his motion for new trial. Rather, in this case, Ms. Bolden jointly submitted the instruction with the State. At the instructions conference, defense counsel stated:

> For the record, I had an instruction of defense of others, and counsel for the state and I collaborated over what we thought would be the best version given the change in the law and our disagreements over the language and settled upon the instruction that was submitted—ultimately submitted by the state.

(Tr. 869). Accordingly, while this Court can exercise its discretion and grant plain-error review, the Court should first consider whether Ms. Bolden's claim warrants the Court's discretionary, plain-error review.

Rule 28.03 requires that defense counsel make specific objections to instructions and include such claims of error in the motion for new trial; it states:

> Counsel shall make specific objections to instructions or verdict forms considered erroneous. *No party may assign as error the giving or failure to give instructions or verdict forms unless the party objects thereto before the jury retires to consider its verdict, stating distinctly the matter objected to and the grounds of the objection*. Counsel need not repeat objections already made on the record prior to delivery of the instructions and verdict forms. The objections must also be raised in

the motion for new trial in accordance with Rule 29.11.

Rule 28.03 (emphasis added).

As stated above, not only did defense counsel fail to object, but counsel affirmatively submitted the instruction with the State. Under Rule 28.03, and because plain error review is discretionary, this Court can decline to review this claim of plain error. *See State v. Brown*, 996 S.W.2d 719, 727-728 (Mo.App. W.D. 1999); *State v. Jackson*, 186 S.W.3d 873, 883 (Mo.App. W.D. 2006) ("Plain error review is discretionary and should be granted sparingly."); *see also State v. Mead*, 105 S.W.3d 552, 556 (Mo.App. W.D. 2003) (where "counsel has affirmatively acted in a manner precluding a finding that the failure to object was a product of inadvertence or negligence," even plain error review is waived). Of course, should the Court desire to do so, it is within the Court's discretion to grant plain error review. *See State v. Derenzy*, 89 S.W.3d 472, 475 (Mo. banc 2002); *State v. Wurtzberger*, 40 S.W.3d 893, 897-898 (Mo. banc 2001).

1. Because Ms. Bolden submitted a jointly-drafted instruction patterned after the current MAI-CR 306.08A, Ms. Bolden's claim does not warrant plain-error review

At Ms. Bolden's trial, two defense-of-others instructions were submitted to the jury—Instruction No. 13 (related to Count I) and Instruction No. 14 (related to Count III) (L.F. 35-40). Both instructions were modeled after MAI-CR 3d

306.08A (effective 1-1-09) (L.F. 37, 40). During the instruction conference, the following discussion was held regarding the instructions:

THE COURT: I'm looking at 306.08A, which the defense proposes we insert at this time.

[Defense counsel]: Right.

THE COURT: This is defense of another?

[Defense counsel]: Defense of another.

THE COURT: And it's the new version that came out like effective the first of January I believe?

[Defense counsel]: Yes.

THE COURT: Did I get that right?

[Prosecutor]: A, yeah.

THE COURT: Give me a moment to look at this. I haven't really studied it.

[Prosecutor]: You're in good company, Judge.

(An off the record discussion was had.)

THE COURT: The defendant submits 306.08A as Instruction No. 12—13—wait a minute.

[Prosecutor]: 13.

THE COURT: 13. Any objection from the state?

[Prosecutor]: No, Your Honor. Technically, it either says—I have—submitted by state is the one I have prepared. You can cross that off, write both, whatever, however you want to do it.

THE COURT: There's no objection either way, right?

[Defense counsel]: No, Your Honor. For the record, I had an instruction of defense of others, and counsel for the state and I collaborated over what we thought would be the best version given the change in the law and our disagreements over the language and settled upon the instruction that was submitted—ultimately submitted by the state.

. . .

THE COURT: Then we've got the same thing as to Count III, right?

[Defense counsel]: Yes.

THE COURT: Which would be Instruction No. 14?

[Prosecutor]: Yes.

(Tr. 868-869).

Ms. Bolden now asserts the trial court plainly erred in giving Instruction No. 14 because the Notes on Use indicate that "This instruction should be used for offenses committed on or after August 28, 2007" (*see* App.Sub.Br. 23). She

argues that because her crime occurred in April, 2007, giving an instruction patterned after MAI-CR 3d 306.08A, was "evident, obvious, and clear error" (App.Sub.Br. 23). But in making this argument, Ms. Bolden ignores the fact that the instruction, as patterned after 306.08A, was submitted at her request (with the agreement of the State).

While it is true that "[t]he giving or failure to give an instruction or verdict form in violation of this Rule 28.02 or any applicable Notes On Use shall constitute error," Rule 28.02(f), it is also true that "[i]f a party gets what [s]he requests from the trial court, [s]he should not be able to convict it of error, plain or otherwise, for complying with h[er] request." *State v. Marshall*, 302 S.W.3d 720, 725 (Mo.App. S.D. 2010).

Here, Ms. Bolden received the instruction she requested, and she should not now be heard to complain that the instruction was improper. In fact, the record reveals that the decision to pattern the instruction after MAI-CR 3d 306.08A was a conscious decision on the part of the parties. In *Marshall*, the defendant argued that he should have received a self-defense instruction because the evidence presented was sufficient to inject the issue. *Id*. at 724. But at trial, the defendant had offered and then withdrawn a self-defense instruction. *Id*. Thus, despite his claim that plain error review was warranted, the Court of Appeals determined that the true issue was whether the defendant had waived his right

to that instruction when he withdrew it before the jury began deliberations. *Id*. The court found that the lack of a self-defense instruction was obviously based upon the defendant's trial strategy, and that he had "waived his right to a self-defense instruction by offering the instruction and then withdrawing it before the jury commenced deliberations." *Id*. at 725. The court further determined that the defendant had no right to complain about the trial court's action complying with his request. *Id*. Similarly, in *State v. Howard*, 615 S.W.2d 498, 500 (Mo.App. E.D. 1981), the Court of Appeals found that the defendant "either waived the giving of the instruction, or invited error" when his counsel agreed with the State during the instruction conference that no self-defense instruction would be given.

A similar result is warranted in Ms. Bolden's case. Because the parties jointly submitted Instruction No. 14, and because the defense ultimately agreed that the instruction should be patterned after MAI-CR 3d 306.08A, the Court should decline to review Ms. Bolden's claim that the trial court plainly erred in submitting an instruction patterned after MAI-CR 3d 306.08A.

2. The standard of review

If the Court concludes that plain error review is warranted, the standard of review places the burden of demonstrating manifest injustice on Ms. Bolden. "For instructional error to constitute plain error, the defendant must demonstrate

the trial court so misdirected or failed to instruct the jury that the error affected the jury's verdict." *State v. Tisius*, --- S.W.3d ---, 2012 WL 724647 *8 (Mo. banc 2012). "If a defect is not readily apparent to alert counsel preparing to argue the case, there is very little likelihood that the jury will be confused or misled." *Id*. In reviewing plain-error instructional claims, the Court is "warranted in adopting a more practical view of the result of failing to give" a proper instruction. *See State v. Howard*, 896 S.W.2d 471, 494 (Mo.App. S.D. 1995) (citing *State v. Sanders*, 541 S.W.2d 530, 533-534 (Mo. banc 1976)).

" '[U]nder Missouri law, plain error can serve as the basis for granting a new trial on direct appeal only if the error was outcome determinative[.] ' " *State v. Baxter*, 204 S.W.3d 650, 652 (Mo. banc 2006) (quoting *Deck v. State*, 68 S.W.3d 418, 427 (Mo. banc 2002)). "Manifest injustice is determined by the facts and circumstances of the case, and the defendant bears the burden of establishing manifest injustice." *Id*. (citing *State v. Mayes*, 63 S.W.3d 615, 624 (Mo. banc 2001)). *Cf*. Rule 28.02(f) ("The giving or failure to give an instruction or verdict form in violation of this Rule 28.02 or any applicable Notes On Use shall constitute error, the error's prejudicial effect to be judicially determined, provided that objection has been timely made pursuant to Rule 28.03").

B. Ms. Bolden did not suffer manifest injustice from the errors identified in Instruction No. 14.

In asserting that the trial court plainly erred, Ms. Bolden points out that the instruction was patterned after MAI-CR 3d 306.08A, that the instruction lacked language from the self-defense instruction involving multiple assailants, and that there were typographical errors in pronoun usage (App.Sub.Br. 25-29). But these alleged errors did not amount to a manifest injustice.

1. There was no evidence to support the "multiple assailants" language from the pattern self-defense instruction

Relying on MAI-CR 3d 306.06, Note on Use 7, Ms. Bolden argues that Instruction No. 14 should have been modified to reflect that the defense-of-others defense was based upon an attack of Randy Bolden by multiple assailants (App.Sub.Br. 23). Specifically, she argues that parts of the instruction should have been modified to include the following language:

> In order for a person lawfully to use force in defense of another person, such a defender must reasonably believe *the person she is trying to protect is in imminent danger of harm from a third person and from persons she reasonably believes are acting together with that person.*

* * *

> And if the defendant reasonably believed Randy Bolden was in imminent danger of death or serious physical injury from the acts of Fannie Powell, *and those whom the defendant reasonably believed were acting in concert with Fannie Powell*, and she reasonably believed that the use of deadly force was necessary to defend Randy Bolden, then she acted in lawful defense of another person.

(App.Sub.Br. 19, 21-22) (emphasis added).

The primary flaw in Ms. Bolden's argument is that there was no substantial evidence to support the multiple-assailants language in relation to Count III. "A jury instruction must be supported by substantial evidence and the reasonable inferences to be drawn therefrom." *State v. Avery*, 275 S.W.3d 231, 233 (Mo. banc 2009). Here, viewing the evidence in the light most favorable to Ms. Bolden and her brother, there was no evidence that Fannie Powell (with the assistance of others) attacked, or intended to attack, Randy Bolden in any manner.[2] In fact, the only evidence of an attack on Randy Bolden was that

[2] There was some evidence that Fannie Powell acted aggressively toward Ms. Bolden after Ms. Bolden stabbed Tiffany Powell in the hand, but nothing in the record suggests that Fannie Powell acted in a manner towards Randy Bolden that would necessitate Ms. Bolden's use of deadly force against Fannie Powell to

Tiffany Powell stabbed him with a screwdriver. But because there was no evidence that Fannie Powell (the victim of Count III) made any effort to attack Randy Bolden, there was no evidence that anyone was acting with Fannie Powell in attacking Randy Bolden. As such, the multiple-assailants language Ms. Bolden asserts she was entitled to was not supported by the evidence.[3]

But even if the trial court should have included the multiple-assailants language in Instruction No. 14, Ms. Bolden did not suffer a manifest injustice from its absence. In its opening paragraphs, Instruction No. 14 instructed the jury generally that "[i]n order for a person lawfully to use force in defense of another

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protect Randy Bolden. Ms. Bolden cites to page 820 of the transcript to assert that Fannie Powell attacked Randy (App.Sub.Br. 24), but page 820 (and surrounding pages) does not contain evidence of any attack by Fannie upon Randy (*see* Tr. 817-821).

[3] It should be noted (and Ms. Bolden acknowledges) that a substantial portion of Ms. Bolden's argument is based on an extrapolation from MAI-CR 3d 306.06, Note on Use 7 (App.Sub.Br. 24-25, n. 4). But MAI-CR 3d 306.08 does not contain a similar Note on Use 7. Thus, inasmuch as MAI-CR 3d 306.08 and its Note on Use do not suggest the modifications advocated by Ms. Bolden, it is not apparent that the trial court's alleged plain error was "evident, obvious, and clear."

person, such a defendant must reasonably believe such force is necessary to defend the person she is trying to protect from what [s]he reasonably believes to be the imminent use of unlawful force" (L.F. 38). This broad language was sufficient to inform the jurors that any "imminent use of unlawful force" against Randy Bolden could be considered in determining whether Ms. Bolden's use of force was justified.

Additionally, the instruction also informed the jurors that "the term 'reasonably believe' means a belief based on reasonable grounds, that is, grounds that could lead a reasonable person *in the same situation* to the same belief" (L.F. 39) (emphasis added). The instruction's use of the phrase "in the same situation" further confirmed that the jurors could consider all of the surrounding circumstances in determining whether Ms. Bolden's use of force was justified. *See generally State v. Goodine*, 196 S.W.3d 607, 621-622 (Mo.App. S.D. 2006) (examining whether the trial court plainly erred in failing to insert multiple-assailants language *sua sponte*).

It is true that the instruction also specifically stated that Ms. Bolden needed to reasonably believe that "the use of force was necessary to defend Randy Bolden from what the defendant reasonably believed to be the imminent use of unlawful force by [Fannie] Powell," but this specific requirement did not preclude the jury from also considering whether other people were also attacking

Randy Bolden. Rather, this more specific part of the instruction merely instructed the jury that use of force against Fannie Powell (the actual victim of Count III) required the defendant to reasonably believe that Fannie Powell was about to use unlawful force against Randy Bolden. This more specific part of the instruction did not preclude the parties from arguing the surrounding circumstances, and it appears that neither the prosecutor nor defense counsel limited closing argument to such a narrow construction of the instruction (*see* Tr. 912-917 918-921). *Compare State v. Beck*, 167 S.W.3d 767, 788 (Mo.App. W.D. 2005) (in finding manifest injustice for failing to include multiple-assailants language in a self-defense case, the Court observed that the prosecutor's closing argument misled the jury to believe, contrary to the law, that it could not consider the acts of the victim's friends (the other assailants); there, the prosecutor had argued, "I would suggest you read the Court's instruction to you on self-defense. It only relates to what Matthew Snarr did, not what anybody else—what the defendant claims somebody else did.").

In short, because there was no substantial evidence that Fannie Powell (in conjunction with others) ever attacked Randy Bolden, the trial court did not plainly err in failing to *sua sponte* modify Instruction No. 14 in the manner now suggested by Ms. Bolden. The applicable MAI did not suggest modifications along those lines, and the instruction that was given did not preclude the jury

from considering all of the surrounding circumstances.

2. Instruction No. 14's use of a masculine pronoun did not give rise to a manifest injustice

Ms. Bolden next complains that Instruction No. 14 improperly used the pronoun "he" when it should have said "she" (App.Sub.Br. 25-26). The instruction stated:

> In order for a person lawfully to use force in defense of another person, such a defender must reasonably believe such force is necessary to defend the person *she* is trying to protect from what *he* reasonably believes to be the imminent use of unlawful force.

(L.F. 38) (emphasis added). Ms. Bolden argues that this typographical error resulted in a manifest injustice because it advised the jury that Ms. Bolden had to reasonably believe such force was necessary based upon what her brother reasonably believed (App.Sub.Br. 26).

While Ms. Bolden is correct that the instruction should have used the pronoun "she," she is incorrect in her assessment of prejudice. Despite the one typographical error, the instruction made plain that "a person acting in the defense of another person is not permitted to use deadly force unless she reasonably believes the use of deadly force is necessary" (L.F. 38-39). Later, in discussing the more specific findings of the jury, the instruction instructed the

jury that it had to conclude that "the defendant reasonably believed that the use of force was necessary to defend Randy Bolden from what *the defendant reasonably believed* to be the imminent use of unlawful force[.]" (L.F. 39) (emphasis added).

"Typographical or inadvertent errors are not necessarily prejudicial when a literate juror could conclude what the instructions were intended to communicate." *Buckallew v. McGoldrick*, 908 S.W.2d 704, 710 (Mo.App. W.D. 1995). "[M]inor, inadvertent deviations from the language of the form of the instruction in question, which do not change the meaning of the instruction or confuse and mislead the jury, are not prejudicially erroneous." *State v. Crump*, 596 S.W.2d 76, 78 (Mo.App. S.D. 1980). "Absolute perfection in form is not the test. The test is whether the instruction is substantially correct." *Gachioch v. Wittmann*, 408 S.W.2d 175, 180 (Mo.App. St.L. Dist. 1966).

In *State v. Foltz*, 634 S.W.2d 558 (Mo.App. S.D. 1982), the defendant argued instructional error based upon the ambiguous use of the pronoun "he" in the verdict-director because it could have referred to either the defendant, or his accomplice, when discussing the defense of entrapment. *Id*. at 559. The Court of Appeals rejected the defendant's argument because a separate instruction on the defense of entrapment specifically referred to the defendant as the possible subject of entrapment. *Id*. at 560. The court held, "If there was any ambiguity in the verdict directing instruction, Instruction 9 makes it clear that it was the

possible entrapment of defendant that was in question." *Id*.

The same is true here. Even if the instruction's improper reference to "he" created an ambiguity, that ambiguity was resolved by the more specific language found later in the instruction that clarified that the reasonable belief addressed must belong to Ms. Bolden, rather than her brother. Thus, Ms. Bolden suffered no prejudice from the improper pronoun. This point should be denied.

II.

The trial court did not abuse its discretion in overruling Ms. Bolden's motion for new trial, alleging juror misconduct, because Ms Bolden's claim is merely an impermissible attempt to impeach the verdict.

In her second point, Ms. Bolden asserts that the trial court abused its discretion in "refusing to hold an evidentiary hearing to determine whether the verdicts should be set aside, and in overruling the motion for new trial" (App.Sub.Br. 30).[4] Ms. Bolden asserts that the trial court had "credible information suggesting that juror Shawn Richardson was not qualified to serve and had engaged in misconduct" (App.Sub.Br. 30).

A. Standard of review

This Court "review[s] the trial court's denial of a motion for new trial for abuse of discretion." *State v. Rios*, 314 S.W.3d 414, 418 (Mo.App. W.D. 2010). "The trial court abuses its discretion when its ruling is clearly against the logic of the existing circumstances and is so arbitrary and unreasonable as to shock the sense

[4] Although Ms. Bolden faults the court for not holding an evidentiary hearing to determine whether the verdicts should be set aside, the record shows that Ms. Bolden was not precluded from presenting evidence in support of the allegations in her motion for new trial at the hearing on her motion for new trial.

of justice and indicate a lack of careful consideration." *Id*. "The findings of the trial court when ruling on a motion for new trial on the grounds of juror misconduct are given great weight and will not be disturbed on appeal unless the trial court abused its discretion." *Id*.

B. Ms. Bolden's claim is merely an attempt to impeach the verdict

Ms. Bolden asserted in her motion for new trial that the court should not have accepted the jury's verdicts as to Counts III and IV because "Juror Shawn Richardson contacted defense counsel the day after the trial and attempted to contact the Court to state that he did not understand what he was doing and that the verdict reached was not his verdict" (L.F. 72). Ms. Bolden argued that, based upon Juror Richardson's representations, "the verdict accepted by the Court was not unanimous" (L.F. 72).[5]

At the hearing on Ms. Bolden's motion for new trial, defense counsel advised the court that he had spoken with Juror Richardson, and "he indicated to

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[5] Ms. Bolden filed an "Amended Motion to Review or Set Aside Jury Verdict and to Compel the Testimony of Shawn Richardson" (Supp.L.F. 1-2), but this motion was filed outside the time limits provided in Rule 29.11(b) and was a nullity. *See State v. Hamilton*, 732 S.W.2d 553, 555 (Mo.App. E.D. 1987) ("Not being timely, the amendment preserves nothing for review, and, procedurally, it is a nullity.").

[counsel] that he was disturbed by the verdict, that during the jury deliberations themselves he went along with the proceedings, that the verdicts were not his, that he should not have voted not guilty [sic], or at least at the time of polling that he should have said no, that those were not his verdicts" (Tr. 935-936). Counsel also advised the court that Juror Richardson "questioned his ability to be a competent juror, thought that other people would be better at doing that, rendering a decision on this type of case" (Tr. 936).

The State indicated that it, too, had spoken with Juror Richardson, but his statements to the State differed from those given to defense counsel. The information he provided to the State was as follows:

> . . . he did express to me that he thought there might have been someone else who could have been a better juror. He said that he felt this because he's never been on jury duty before.
>
> He did say that he did work with the jury. He said he reviewed the instructions personally. He said he paid attention to all of the facts and the evidence in the case, and he used that in order to make his verdict.
>
> When I asked him did he—is he changing his mind, did he have a different verdict that he felt pressured into, he said no. And he said, "I am just as liable as they are," meaning the rest of the jury.

At no point did he express to me that he wanted to change his mind.

At no point did he express to me that he did not feel like he had a part in the process.

(Tr. 938).

Regardless of Juror Richardson's representations to either party, "The rule is perfectly settled, that jurors speak through their verdict, and they cannot be allowed to violate the secrets of the jury room, and tell of any partiality or misconduct that transpired there, nor speak of the motives which induced or operated to produce the verdict." *Strong v. State*, 263 S.W.3d 636, 643 (Mo. banc 2008) (quoting *State v. Babb*, 680 S.W.2d 150, 152 (Mo. banc 1984)). "[O]nce an unambiguous, unanimous verdict is returned, the jury polled, and the verdict recorded, the verdict is no longer impeachable for lack of unanimity simply because a juror had a later change of mind." *State v. Carter*, 955 S.W.2d 548, 557 (Mo. banc 1997).

Here, because the jury was polled and every juror stated agreement with the verdict, Ms. Bolden's claim is merely an impermissible attempt to impeach the jury's verdict. Juror Richardson's alleged concerns only touched upon alleged deficiencies during deliberations (impermissible impeachment of the verdict), and his subjective belief that he was not "qualified" did not reveal that he had failed to disclose any legally disqualifying bias during voir dire. This point

should be denied.

CONCLUSION

The Court should affirm Ms. Bolden's convictions and sentences.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

I hereby certify that the attached brief complies with Rule 84.06(b) and contains 6,605 words, excluding the cover, this certification, the signature block, and the appendix, as counted by Microsoft Word; that the electronic copy of this brief was scanned for viruses and found to be virus free; and that notice of the filing of this brief, along with a copy of this brief, was sent through the Missouri eFiling System on April 10, 2012, to:

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